(15)

No. 93-1543

In The

Supreme Court of the United States

October Term, 1994

CHRISTINE MCKENNON,

Petitioner,

v.

THE NASHVILLE BANNER PUBLISHING COMPANY,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals For The Sixth Circuit

BRIEF AMICI CURIAE OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a new defense, with no basis in established law, premised upon the collateral misconduct of a victim of discrimination, should be created for employers accused of violating federal laws prohibiting employment discrimination.

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INTEREST OF AMICI CURIAE

The National Employment Lawyers Association (NELA) is a national bar association with over 1,990 lawyer members in all fifty states, the District of Columbia, Puerto Rico, and the Virgin Islands. NELA was founded in 1985. Its members include most of the leading employment lawyers practicing law primarily on behalf of employees. NELA members have and continue to represent tens of thousands of victims of employment discrimination in federal and state courts. NELA members' clients will be significantly harmed, as will the public, if discriminating employers are given a special defense, with no basis in the law, which bars the claims or remedies Congress intended for discrimination victims.

The Association of Trial Lawyers of America (ATLA) is a voluntary national bar association of approximately 50,000 members. ATLA members primarily represent plaintiffs seeking redress for personal injury or the deprivation of their rights under the law, as well as criminal defendants. ATLA views the decision below as inconsistent with the clear Congressional intent to protect the right of Americans to be free of discrimination in employment.

SUMMARY OF ARGUMENT

The after-acquired evidence doctrine adopted by the court below has no basis in law. First, the legislation does not provide for the defense. Second, the doctrine contravenes well-established caselaw interpreting the statutes in conjunction with the Congressional intent and public

policy underlying the statutes. Finally, the doctrine distorts and misapplies the common law defenses of clean hands and *in pari delicto* to discrimination claims when well-established principles prohibit such application.

In order to avoid redundancy, this brief will focus primarily on the application of common law defenses to discrimination cases with the understanding that the broad legislative interpretation and public policy issues will be thoroughly briefed by petitioner and other amici.

POINT I

ESTABLISHED LEGAL PRINCIPLES PROHIBIT THE APPLICATION OF THE CLEAN HANDS AND *IN PARI DELICTO* DEFENSES AS THEY HAVE BEEN APPLIED IN THIS CASE UNDER THE GUISE OF THE SO-CALLED AFTER-ACQUIRED EVIDENCE DEFENSE

The after-acquired evidence doctrine applied by the Sixth Circuit below and originated by the Tenth Circuit in *Summers v. State Farm Mut. Auto. Ins. Co.*, 864 F.2d 700 (10th Cir. 1988), completely bars an employment discrimination action brought pursuant to the federal anti-discrimination statutes because of some collateral misconduct by the plaintiff. This new defense is not based upon the legislation, the purpose of the legislation, or the caselaw developed to interpret the statutes in accordance with the Congressional intent. *See* Points II and III, *infra*. Rather, this new defense is a distorted application of the common law defenses of "unclean hands" and *in pari delicto*.

The maxim that "he who comes into equity must come with clean hands," *Manufacturers Finance Co. v. McKey*, 294 U.S. 442, 451 (1935), may have first arisen in the case of a highway robber who was prohibited from suing his accomplice for his share of the fruits of their crimes. *Everet v. Williams* (Ex. 1725), *described in* Note, *The Highwayman's Case*, 35 L.Q. Rev. 197 (1893). The doctrine prohibits one who has engaged in unconscionable conduct with relation to the transaction involved in the suit from invoking the equitable powers of the court to enforce the requirements of good faith and fair dealing. *See Henry McClintock, Handbook of the Principle of Equity*, (2d ed. 1948); Zechariah Chafee Jr., "Coming Into Equity with Clean Hands," 47 Mich. L. Rev. 7 (1949). The common law doctrine of *in pari delicto* is the analogous principle in legal actions and provides a defense in an action for damages if the plaintiff has "been involved generally in 'the same sort of wrongdoing' as defendants." *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 307 (1985), citing *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 138 (1968).

In cases in which the clean hands or *in pari delicto* defenses have been raised in response to private actions brought under federal statutes, those defenses have been limited or rejected entirely if the *public* interest is not served by allowing them. Thus, in *A.C. Frost & Co. v. Couer D'Alene Mines Corp.*, 312 U.S. 38, 43 (1941), the Court analyzed the defenses Congress provided in the Securities Act of 1933 and the purpose of that Act in deciding whether the clean hands defense was available. Finding that application of the clean hands defense in

that case would frustrate rather than effectuate the purposes of the Act, the Court rejected the defense. Similarly, in *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983), the Court found that common law doctrines have "questionable pertinence" in cases brought under federal securities laws which were enacted "to rectify perceived deficiencies in the available common-law protections by establishing higher standards of conduct in the securities industry." *Id.* at 388-89.

1. Application Of The Common Law Defenses Of Clean Hands And *In Pari Delicto* To Discrimination Cases Frustrates Congressional Intent And The Public Policy

The availability of the clean hands or *in pari delicto* defenses to this case would clearly frustrate the purposes of the Age Discrimination in Employment Act.[1] If the

[1] A few courts have allowed these common law defenses in discrimination cases, without much analysis. *Women Employed v. Rinella & Rinella*, 468 F.Supp. 1123, 1129 (N.D. Ill. 1979) (allowing defense in *dicta* based on post-termination misconduct); *Hargett v. Delta Automotive*, 765 F.Supp. 1487, 1492-93 (N.D. Ala. 1991) (rejecting clean hands defense on the facts); *Woods v. Ficker*, 768 F.Supp. 793, 801-02 (N.D. Ala. 1991), *aff'd without op.*, 972 F.2d 1350 (11th Cir. 1992) (allowing clean hands defense in *dicta*).

However, The Ninth and Eleventh Circuits have thoroughly analyzed the availability of the clean hands defense in discrimination cases. In *EEOC v. Recruit U.S.A., Inc.*, 939 F.2d 746, 753-54 (9th Cir. 1991), the Ninth Circuit refused the defense against the EEOC, which violated statutory confidentiality rules, finding that the public interest in eliminating discrimination in employment outweighed the clean hands doctrine in that case. "[T]he

clean hands and *in pari delicto* defenses are appended to the law, an employer guilty of discrimination can completely evade the law's sanctions because of alleged collateral misconduct by plaintiff. Such a result ignores the *public* purposes of the anti-discrimination laws.[2] In *Perma Life*, 392 U.S. 134, the language and intent of the anti-trust

clean hands doctrine should not be strictly enforced when to do so would frustrate a substantial public interest." *Id.* at 753. In *Calloway v. Partners Nat'l Health Plans*, 986 F.2d 446, 450-51 (11th Cir. 1993), the Eleventh Circuit found that plaintiff's unclean hands (due to résumé fraud) had no nexus to the wage discrimination claim at issue and that defendant had not been injured by plaintiff's collateral misconduct. Having failed to meet those two requirements, defendant was precluded from employing the clean hands defense.

[2] The doctrine as it has been applied in many courts does not require any job-relatedness analysis. Therefore, it encourages employers to delve deeply into matters that are irrelevant or only remotely relevant to job performance. *See, O'Driscoll v. Hercules, Inc.*, 745 F.Supp. 656 (D.Utah 1990), *aff'd* 12 F.3d 176 (10th Cir. 1994) (employee misconduct: misleading statements on employment application forms regarding employee's age, ages of employee's children, whether employee had previously applied for employment with employer, name of a previous employer, date of high school graduation, and educational background); *Milligan-Jensen v. Michigan Technological Univ.*, 975 F.2d 302 (6th Cir. 1992), *cert. granted*, 113 S.Ct. 2991 (1993), *cert. dism.* 114 S.Ct. 22 (1993) (employee misconduct: a DUI conviction 5 years before hiring not divulged on employment application); *Baab v. AMR Serv. Corp.*, 811 F.Supp. 1246, 1255-56 (N.D. Ohio 1993) (employee misconduct: failing to accurately answer health-related questions that violate the Americans with Disabilities Act! 42 U.S.C. §12112(c)(1) and (2)). Increasing forays into issues of doubtful job-relatedness raise significant privacy concerns that affect the public as a whole.

laws were analyzed in detail, resulting in the Court finding that the *in pari delicto* defense was not available in that anti-trust case.

> There is nothing in the language of the antitrust acts which indicates that Congress wanted to make the common-law *in pari delicto* doctrine a defense to treble-damage actions, and the facts of this case suggest no basis for applying such a doctrine even if it did exist. . . . We have often indicated the inappropriateness of invoking broad common-law barriers to relief where a private suit serves important public purposes. . . . [T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws. The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement. And permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position since they remain fully subject to civil and criminal penalties for their own illegal conduct. *Kiefer-Stewart*, supra.

Id. at 138-39. *See also, Bateman Eichler, Hill Richards, Inc.*, 472 U.S. at 308 (quoting *Perma Life*, 392 U.S. at 151) ("[Because] of the strong public interest in eliminating restraints on competition, . . . many of the refinements of moral worth demanded of plaintiffs by . . . many of the

variations of *in pari delicto* should not be applicable in the antitrust field.").

As noted in *Perma Life*, there may be other remedies available to defendants which will not frustrate the important public purpose of this federal legislation. An employer may have a counterclaim against an employee for fraud or theft, for example. Because Congress specifically provided that discrimination claims should be decided by juries, a complete bar or even a judicially fashioned limitation on remedies frustrates the express language of the Acts. 42 U.S.C. §1981a(c)(1); 29 U.S.C. §626(c)(2). A counterclaim, in which an employer can claim that it was wronged by an employee's misconduct, does not frustrate that Congressional goal or the Seventh Amendment. *See also, Kiefer-Stewart Co. v. Seagram & Sons, Inc.*, 340 U.S. 211, 214 (1951), *overruled on other grounds, Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984):

> If petitioner and others were guilty of infractions of the antitrust laws, they could be held responsible in appropriate proceedings brought against them by the Government or by injured private persons. The alleged illegal conduct of petitioner, however, could not legalize the unlawful combination by respondents nor immunize them against liability to those they injured.

Some courts have relied on the concept that a plaintiff who misrepresented employment history or qualifications would not have been hired in the first place, so

there can be no injury consequent to an illegal termination. This logic ignores the *public* injury inherent in discrimination and distorts the law in a way that disfavors only discrimination victims. For example, a tippee (someone who receives and acts upon illegal insider information) is not precluded from suing a tipster for securities fraud. *Bateman Eichler, Hill Richards, Inc.*, 472 U.S. at 317. Of course, if the tippee had not illegally acted on inside information the relationship between the parties would never have been created and the tippee would not have been harmed. But public policy implications precluded the *in pari delicto* defense. *Id.* Similarly, muffler dealers who voluntarily entered into a franchise agreement, that in many ways benefited them, were not precluded by *in pari delicto* from suing the franchisor for restraint of trade in violation of the Sherman and Clayton Acts. *Perma Life*, 392 U.S. 134.

This Court has developed a two-part test to determine when the *in pari delicto* defense is available. It is available

> "only where (1) as a direct result of his own actions, the plaintiff bears at least substantially equal responsibility for the violations he seeks to redress, and (2) preclusion of suit would not significantly interfere with the effective enforcement of the securities laws and protection of the investing public." *Id.*, at 310-311. The first prong of this test captures the essential elements of the classic *in pari delicto* doctrine. *See id.*, at 307. The second prong, which embodies the doctrine's traditional requirement that public policy implications be carefully considered before the defense is allowed, *see ibid.*, ensures that the broad judge-made law does not undermine the congressional policy favoring private suits as an important mode of enforcing federal securities statutes.

Pinter v. Dahl, 486 U.S. 622, 633 (1988).

Application of the two-pronged test to this case requires rejection of the *in pari delicto* defense. In regard to the second prong, the federal anti-discrimination statutes serve a public purpose at least as important as the public purposes underlying the federal securities and anti-trust laws, where the defense has been rejected.

Only in cases "in which the *statutory* goal of deterring illegal conduct is served more effectively by preclusion of suit than by recovery. . . . [should] the *in pari delicto* defense[] be afforded." *Pinter*, 486 U.S. at 634. The actions of the petitioner herein, and in almost all of the reported after-acquired evidence cases, do not even approach illegal conduct, much less conduct as repugnant to the public policy as discrimination. Indeed, the availability of the defense thwarts the Congressional policy of eradicating employment discrimination.

> Like the common law of torts, the statutory employment "tort" created by Title VII has two basic purposes. The first is to deter conduct which has been identified as contrary to public policy and harmful to society as a whole. . . . The second goal of Title VII is "to make persons whole for injuries suffered on account of unlawful employment discrimination."

Price Waterhouse v. Hopkins, 490 U.S. 228, 264-65 (1989) (O'Connor J., concurring) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975)).

The primary objective of Title VII is "to achieve equality of employment opportunities and remove barriers that have operated in the past." *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971). The Act was intended by Congress to combat "historic evil of national proportions." *Albemarle Paper*, 422 U.S. at 416.

The faith in our judiciary of those most disenfranchised by the national shame of discrimination in our society will certainly suffer a severe blow if the moral purity demanded of them is greater than that required of those suing over securities or anti-trust violations.

2. There Is Not An Adequate Nexus Between Petitioner's Misconduct And Respondent's Illegal Behavior

Even if this Court deems the public purposes of the discrimination laws insufficient to limit defenses as they have been limited in securities and anti-trust cases, established principles outlining the parameters of the clean hands and *in pari delicto* defenses prohibit their application in this and in most other discrimination cases. The first part of the test adopted in *Pinter*, 486 U.S. 622, requires plaintiff's actual participation in the unlawful activity in order for the defendant to have available the *in pari delicto* defense:

> Under the first prong of the *Bateman Eichler* test, as we have noted above, a defendant cannot escape liability unless, as a direct result of the plaintiff's own actions, the plaintiff bears at least substantially equal responsibility for the underlying illegality. The plaintiff must be an

> active, voluntary participant in the unlawful activity that is the subject of the suit.

Id. at 635.

The clean hands defense likewise requires a direct nexus between plaintiff's conduct and the defendant's illegal conduct:

> But courts of equity do not make the quality of suitors the test. They apply the maxim requiring clean hands only where some unconscionable act of one coming for relief has *immediate and necessary relation* to the equity that he seeks in respect of the matter in litigation. They do not close their doors because of plaintiff's misconduct, whatever its character, that has no relation to anything involved in the suit, but only for such violations of conscience as in some measure affect the equitable relations between the parties in respect of something brought before the court for adjudication. Story, *id.*, §100. Pomeroy, *id.*, §399. They apply the maxim, not by way of punishment for extraneous transgressions, but upon considerations that make for the advancement of right and justice.

Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 245 (1933).

The Seventh Circuit has stressed the nexus required in order to sustain the clean hands or *in pari delicto* defenses in wrongful termination cases based upon the First Amendment. Those cases require a strong *public* policy militating against the relief sought by a plaintiff in order to allow the defenses.

A discharge does not violate the First Amendment even though the only reason for the discharge is political, if reinstatement or the other relief requested would violate strong public policy, for example as embodied in state criminal prohibitions of "ghost employment" (which means being on the public payroll without doing any work). *Byron v. Clay, supra,* 867 F.2d at 1051-52. To that extent – but to that extent only – there is a defense of "unclean hands" (if equitable relief is sought) or *"in pari delicto"* (if legal relief is sought). But the mere fact that valid grounds exist for discharging the worker will not excuse the employer if, had it not been for the worker's political beliefs, he would not have been discharged.

Pieczynski v. Duffy, 875 F.2d 1331, 1333 (7th Cir. 1989) *reh'g denied,* 1989 U.S. App. LEXIS 10065 (7th Cir. 1989).

Similarly, in refusing the clean hands defense to city officials sued by discharged city employees who claimed that their discharges were politically motivated, the Seventh Circuit found that one plaintiff's alleged Hatch Act violations (illegal political activities by a government employee) were not connected sufficiently to the wrongful termination claims to allow the defense. The Court held:

> Unless courts insist on a tight connection between the object of the injunction and the misconduct of the plaintiff, suits for injunction will bog down in all sorts of collateral inquiries. In this age of legalism, when relatively few plaintiffs are wholly free from any trace of arguable misconduct at least tangentially related to the objective of their suit, the right to injunctive

> relief, especially to preliminary injunctive relief, would have little value if the defendant could divert the proceeding into the byways of collateral misconduct.

Shondel v. McDermott, 775 F.2d 859, 869 (7th Cir. 1985).

The petitioner's misconduct in this case is so collateral that it cannot arguably be connected to the age discrimination of respondent. Similarly, in *Milligan-Jensen v. Michigan Technological Univ.,* 975 F.2d 302 (6th Cir. 1992), *cert. granted,* 113 S.Ct. 2991 (1993), *cert. dism.* 114 S.Ct. 22 (1993), the plaintiff's omission of a DUI conviction (5 years earlier) on her employment application for a security guard job was found to preclude a lawsuit seeking redress for particularly crude and obvious sex discrimination. In fact, in most reported discrimination cases there is absolutely no nexus between the employee's misconduct and the employer's illegal behavior. *See Massey v. Trump's Castle Hotel & Casino,* 828 F.Supp. 314 (D.N.J. 1993) (plaintiff suing for race discrimination in a failure to promote case failed to notify discriminating employer that he had been terminated from a police department 16 years earlier for misplacing his gun); *Wallace v. Dunn Constr. Co. Inc.,* 968 F.2d 1174 (11th Cir. 1992) (employee omitted conviction for possession of cocaine and marijuana on employment application); *O'Driscoll v. Hercules, Inc.,* 745 F.Supp. 656 (D.Utah 1990), *aff'd* 12 F.3d 176 (10th Cir. 1994) (employee misrepresented on application forms the ages of her children, the date of her high school graduation, the fact that she had previously applied for a job with the employer, and her educational background.)

Thus, established precedent prohibits allowing discriminating employers an absolute defense based upon collateral misconduct by plaintiffs.

POINT II

THE LEGISLATION AT ISSUE DOES NOT PROVIDE FOR THE AFTER-ACQUIRED EVIDENCE DEFENSE

There is no basis for the after-acquired evidence defense in the plain language of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, or the Age Discrimination in Employment Act, 29 U.S.C. §600.[3] The judiciary "cannot supply what Congress has studiously omitted." *FTC v. Simplicity Pattern Co., Inc.*, 360 U.S. 55, 67 *reh'g denied*, 361 U.S. 855 (1959); *See also, Great Atlantic & Pacific Tea Co., Inc. v. FTC*, 440 U.S. 69, 79 (1979). This Court has declined to judicially create affirmative defenses that are absent from the discrimination laws. *Int'l Union, United Automobile, Aerospace, and Agric. Implement Workers of Am. OAW v. Johnson Controls, Inc.*, 499 U.S. 187, 210, 214 (1991); *County of Washington v. Gunther*, 452 U.S. 161, 170 (1981). The Court should not accept respondent's invitation to legislate here.

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[3] This Court has held that the standards of proof, methodology, and defenses available under cases brought pursuant to the ADEA are the same as those brought pursuant to Title VII. *See Price Waterhouse*, 490 U.S. at 292; *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 & n.16 (1985); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755-58 (1979).

POINT III

THE CASELAW INTERPRETING AND ENFORCING THE FEDERAL ANTI-DISCRIMINATION LAWS AND POLICIES PROHIBITS THE AFTER-ACQUIRED EVIDENCE DEFENSE

The law established by this Court interpreting Title VII (and, by analogy, the ADEA) requires employers to make victims of employment discrimination "whole" and notes the strong federal policy against employment discrimination. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971).

The doctrine at issue in this case is contrary to the established caselaw. It actually allows employers to discriminate with impunity. After an intensive investigation into almost any employee's history and work record some collateral misconduct is sure to emerge.

Indeed, the *Summers* doctrine promotes retaliation against employees who charge their employers with discrimination. The first stage of the retaliation is an exhaustive search for some indiscretion – no matter how long ago or remote to the issues at hand – while employees who do not complain about discrimination are not subject to such investigation. The second stage of the retaliation is the employer's actual or theoretical *post hoc* termination only of the employee who complained of discrimination while other employees who have engaged in similar misconduct are not terminated. Not only is such retaliation not sanctioned by the statutes and established caselaw, it is specifically illegal. 29 U.S.C. §623(d) and 42 U.S.C. §2000e-3(a).

The *Summers* court relies primarily on a misreading of the ruling in *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) in fashioning the after-acquired evidence defense. This Court ruled in *Mt. Healthy* that a school board could avoid liability for failing to rehire a teacher in violation of the First Amendment if it proved that it would have taken the same action for completely independent grounds *known at the time*. *Id.* at 285-86.

As noted by at least one court, the *Summers* rule contradicts *Mt. Healthy*:

> [T]he *Summers* rule clashes with the *Mt. Healthy* principle (adapted for use in statutory discrimination cases) that the plaintiff should be left in no worse a position than if she had not been a member of a protected class or engaged in protected opposition to an unlawful employment practice.

Wallace v. Dunn Constr. Co., Inc., 968 F.2d 1174, 1179 (11th Cir. 1992) (citing *Mt. Healthy*, 429 U.S. at 285-86).

Additionally, *Mt. Healthy* cannot be extended in a way that contradicts the actual statutes, as amended, or thwarts Congressional intent.

In another fiction, the *Summers* court reasons that a plaintiff guilty of collateral misconduct is not "injured" by illegal discrimination because he/she would have been fired if the employer knew of the collateral misconduct. This analysis has no basis in law. It is articulately refuted by the court in *Massey v. Trump's Castle Hotel & Casino*, 828 F.Supp. 314 (D.N.J. 1993):

> It is problematic at best to say that there has been no injury in the face of proven illegal

> conduct. The after acquired evidence cases are not equivalent to the mixed-motive cases upon which they rely. In a mixed-motive case, the employer had more than one reason for its employment decision, and that decision would not have been changed if the illegal motives were removed. In the after acquired evidence cases, however, the employment decision was based solely on illegal grounds. Absent those illegal motives, the employee would still be employed. Thus, an illegal discharge causes an injury regardless of an employee's previous misconduct, and that injury must be subject to some redress.

Id. at 322 (footnote omitted).

Moreover, the concept that collateral misconduct by a plaintiff can act as a complete defense for a discriminating employer conflicts with the principles outlined in *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S.Ct. 2742 (1993). In *Hicks*, the Court determined that a plaintiff does not necessarily prevail in an employment discrimination case simply by proving that an employer's proffered reasons for termination are untrue. "[N]othing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable." *Hicks*, 113 S.Ct. at 2751.

Thus, even where an employer has committed perjury by falsely stating its reasons for an adverse employment action against plaintiff, the employer is not

precluded from prevailing on the merits.[4] The employer's wrongdoing in this respect has no determinative effect upon the litigation. Rather, plaintiff must prove his or her case showing, through a preponderance of the evidence, "that the employer's action was the product of unlawful discrimination." *Id.*

To allow the use of the after-acquired evidence defense to bar recovery by plaintiff where intentional discrimination has been found is thus antithetical to the holding of *Hicks*, as well as the entire body of discrimination law this Court has produced.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the clean hands and *in pari delicto* defenses should not be distorted in order to develop a special defense for employers who violate federal anti-discrimination laws. The important federal public policy underlying the discrimination laws prohibits application of the clean hands

[4] As noted by the Court in *Hicks*: "Title VII is not a cause of action for perjury; we have other civil and criminal remedies for that." *Id.* at 2754. Similarly, employers who are allegedly wronged by employee misconduct have civil and criminal remedies available to them. *See* POINT I, *supra*.

and *in pari delicto* defenses just as the securities and antitrust laws prohibit their application.

Respectfully submitted,

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